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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF
THE UNITED STATES

_____ Term, 1978

No. 77-6553

ORIGINAL COPY

WILLIAM ARRINGTON,

Appellant,

v.

STATE OF MISSOURI,

Appellee.

MOTION TO DISMISS

The appellee, the State of Missouri, respectfully moves that this Court dismiss this appeal from the judgment of the Missouri Supreme Court, entered in this action on January 9, 1978, on the grounds set forth herein.

OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 559 S.W.2d 749 (Mo.Banc 1978). A copy of that opinion appears in appellee's Appendix A.

JURISDICTION

On January 9, 1978, the Missouri Supreme Court issued an opinion affirming the appellant's conviction for murder in the second degree and robbery in the first degree. Thereafter, appellant filed a timely notice of appeal to this Court under Supreme Court Rule 11(1) with the Missouri Supreme Court on February 24, 1978. Said notice of appeal was docketed in this Court on April 11, 1978. Appellant failed to comply with Supreme Court Rule 13(1) which requires the appellant to docket the case "Not more than ninety days after the entry of the judgment appealed from . . . ." Although the appellant filed a motion to proceed in forma pauperis, he nowhere explains the reason for the delay in docketing.

While it is true that Supreme Court Rule 13 is not jurisdictional, as announced in Johnson v. Florida, 391 U.S. 596 (1968), and that this Court has authority to review this case, it should not in view of the fact that no good cause has been shown for the appellant's failure to comply with the Supreme Court Rules. See the case of Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., et al., 385 U.S. 32 (1966), where this court granted a motion to dismiss for failure to comply with Supreme Court Rule 13(1).

The appellant appears confused as to whether he is proceeding by direct appeal or upon a writ of certiorari. He claims jurisdiction is in this court pursuant to 28 U.S.C. § 1257(2) dealing with direct appeals, but claims that his appeal is timely under Supreme Court Rule 22(2), which deals with writs of certiorari. As to the latter assertion, the appellant is incorrect as he is attempting to gain review of a judgment of "a state court of last resort in a criminal case" and thus would be proceeding under Rule 21(1), not 22(2) relating to judgments of courts of appeals. In any event, the rules relating to writs of certiorari have no direct applicability to a direct appeal under 28 U.S.C. § 1257(2).

The appellant alleges jurisdiction is in this court pursuant to 28 U.S.C. § 1257(2) which provides that

> "Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

However, nowhere in appellant's jurisdictional statement, nor in the body of his appeal, does he inform this Court of what statute is allegedly repugnant to the Constitution in this case. Rather, appellant alleges that the Missouri Constitution, art. I, § 22(b), which he does quote from, violates the Sixth and Fourteenth Amendments to the United States Constitution. Such is not in conformity with either 28 U.S.C. § 1257(2) nor with this Court's mandate in Supreme Court Rule 15(1)(b)(v).

For appellant's failure to show jurisdiction in this Court to hear this appeal, appellee respectfully requests this Court to dismiss the appeal.

QUESTION PRESENTED

Was the appellant's right to a fair trial denied because the Missouri Constitution gives women the right to avoid jury duty by requesting an exemption?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment and the Fourteenth Amendment to the United States Constitution as well as art. I, § 22(b) of the Missouri Constitution. These Constitutional provisions are set out below.

"AMENDMENT VI--JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

"AMENDMENT XIV.--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Missouri Constitution, art. I:

"Section 22(b). Female jurors--optional exemption.--No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

STATEMENT

The appellant William Arrington was convicted of murder in the second degree and robbery in the first degree. The trial began on April 12, 1976, in Jackson County, Missouri. After the jury was impaneled, defense counsel objected to the jury panel on the basis that appellant was denied due process by the fact that the Missouri Constitution and statutes allow the exclusion of females because of their gender. Defense counsel asked that the jury be quashed and a new panel drawn. Said objection was overruled. The verbatim colloquy between defense counsel and the court is as follows:

> "MR. MERRITT: Judge, I have one objection to the jury panel. I believe that the client would be denied due process by the fact that our Missouri Constitution and statutes allow the exclusion of females from jury duty because of their gender. I believe that that is a denial of due process and ask that the jury be quashed and a new jury panel drawn on the basis of non-exclusion of an identifiable group of the populace.
>
> "THE COURT: Overruled."

Defense counsel did not request a hearing on the question of exclusion of females, nor did he make any offer of proof.

The appellant's conviction was appealed to the Missouri Supreme Court and on June 9, 1978, the Missouri Supreme Court affirmed appellant's conviction on the grounds that no evidence was offered at trial on this point. In addition, the court stated that the challenged constitutional provision had recently been upheld in State v. Duren, 556 S.W.2d 11 (Mo.Banc 1977). (That case is before this Court on a writ of certiorari, No. 77-6067).

I.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED IN THIS CASE WAS NOT PROPERLY RAISED, AND THE AFFIRMANCE OF APPELLANT'S CONVICTION RESTS ON AN ADEQUATE NON-FEDERAL BASIS, AND THEREFORE APPELLANT'S APPEAL SHOULD BE DISMISSED.

1. The question sought to be reviewed was not properly raised.

The appeal in this case does not present a substantial federal question for the reason that the federal question sought to be reviewed was not properly raised. The appellant in this case made only a general objection to the make-up of the jury venire, i.e., that the Missouri Constitution and statutes allowed the exclusion of females because of their gender. Defense counsel did not request a hearing during which he could have presented evidence to substantiate his allegation nor did he proffer an offer of proof to substantiate his challenge to the jury venire.

2. Failure to properly raise this issue means affirmance of appellant's conviction rests on a non-federal basis.

The failure of appellant to produce any proof at trial on the issue of the exclusion of women from the jury venire means that the Missouri Supreme Court judgment in this case rests on an adequate non-federal basis. The law in Missouri is clear that the burden is on the appellant to sustain his claim that a jury venire is not composed of a fair cross section of the community. State v. Amerison, 399 S.W.2d 53 (Mo. 1966). And appellant's assertions alone will not sustain his burden of proof. State v. Mooring, 445 S.W.2d 303 (Mo. 1969); State v. Conley, 541 S.W.2d 4 (Mo.Ct.App. at K.C. 1976). When facts are not presented in the record, there is insufficient evidence to sustain a challenge to the jury venire. State v. Morrison, 545 S.W.2d 376 (Mo.Ct.App. at K.C. 1976).

Thus, appellant's failure to produce any evidence on this issue at trial renders his claim of error unpreserved. As indicated by the Supreme Court in its opinion in this case, appellant's failure to produce evidence on this question would, alone, be sufficient to affirm his conviction.

II.

THIS APPEAL SHOULD NOT BE CONSIDERED AS A PETITION FOR A WRIT OF CERTIORARI BECAUSE THE APPELLANT HAS FAILED TO COMPLY WITH THE SUPREME COURT RULES DEALING WITH SUCH PETITIONS, SPECIFICALLY SUPREME COURT RULES 23(1)(d)(f) and 23(4), AND FOR THE FURTHER REASON THAT THE MISSOURI SUPREME COURT'S DECISION IN STATE V. ARRINGTON IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN TAYLOR V. LOUISIANA, 419 U.S. 522 (1975).

Appellee requests that this Court decline to exercise its discretion to consider appellant's faulty appeal as a petition for a writ of certiorari because, considering appellant's petition as one for certiorari, the appellant has failed to comply with Supreme Court Rule 23(d), in that he has failed to set out verbatim the statutes pertaining to the jury selection system in Jackson County, Missouri, wherein he was tried. Also, despite the fact that appellant raised an objection to the jury venire, it was not properly raised and there was no offer of proof to substantiate his challenge, and so appellant has failed to conform with Supreme Court Rule 23(f).

In light of the fact that under Supreme Court Rule 23(4) "the failure of the petitioner to present with accuracy, brevity, and clearness, whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition," appellee respectfully requests this Court to decline to consider appellant's petition as one for a writ of certiorari.

Furthermore, the Missouri Supreme Court did not decide the instant case in "a way probably not in accord with applicable decisions of this Court." The case relied on by the appellant, Taylor v. Louisiana, 419 U.S. 522, 537 (1975), was a case controlled by a set of facts which rendered the jury venire in that case "almost totally male." In such a situation, the jury venire would not represent a fair cross section of the community, and thus would violate the Sixth Amendment to the Constitution, which has been made applicable to the states through the Fourteenth Amendment.

The appellant in this case presented no facts from which the Missouri Supreme Court could consider the operation of the Jackson County jury system, or from which this Court could find a constitutional infirmity. As there

is no evidence, there is no way this Court could ascertain whether the jury selection system operated substantially the same as, or different than, the one considered in Taylor v. Louisiana, supra. Thus this Court would be unable to determine any conflict between the Missouri Supreme Court decision and this Court's decision in Taylor.

CONCLUSION

For the above-stated reasons, this appeal should be dismissed.

Respectfully submitted,

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